No. 20390

In the

United States Court of Appeals

for the Ninth Circuit

A. Bates Butler, as Trustee of Construction Materials Co., *Appellant,*

vs.

City of Tucson, et al., *Appellees.*

Martin Construction Co. and Pacific National Insurance Co., *Appellants,*

vs.

Bank of Tucson, et al., *Appellees.*

The Bank of Tucson, *Appellant,*

vs.

Pacific National Insurance Company, et al., *Appellees.*

On Appeal from the United States District Court
for the District of Arizona

Answering Brief of Appellees Pacific National Insurance Company and Martin Construction Company on Cross-Appeal of The Bank of Tucson

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PREFATORY NOTE

The parties are referred to herein as follows: appellant The Bank of Tucson as "Bank;" A. Bates Butler, trustee in bankruptcy of Construction Materials Co., as "Trustee;" Construction Materials Company as "Construction;" City of Tucson as "City;" Martin Construction Company as "Martin," and Pacific National Insurance Company as "Pacific."

The jurisdictional statement in the Answering Brief of appellees Pacific and Martin on the primary appeal is adopted herein by this reference.

STATEMENT OF THE CASE

Appellees Pacific and Martin controvert Bank's recited Facts of the Case insofar as Bank assumes on page 6 of its Opening Brief on Cross-Appeal that the promissory note, Joint Exhibit 19, "was placed in the hands of the Bank's attorneys for collection." To the contrary, the record reveals that Bank had received the sum of $160,932.33 in payment on said note prior to commencement of this action by Trustee and pursuant to assignment was to receive municipal bonds in an amount sufficient to satisfy the balance due upon issuance of said bonds by City. The action below was not one instituted by Bank for collection, but instead one brought by Trustee to avoid the assignment under which Bank already had received $160,932.33 (Complaint, Count II) and was about to receive an additional sum in municipal bonds (Complaint, Count III).

ARGUMENT

It is the position of appellees Pacific and Martin that the District Court's Finding of Fact No. 25 that ten (10%) per cent of the amount found due from Construction to Bank would be an unreasonable attorney's fee was not "induced by an erroneous view of the law," as contended by Bank on page 15 of its Opening Brief on Cross-Appeal. It is the further contention of these appellees that the note was not "placed in the hands of an attorney for collection" within the meaning of the provision therein for attorney's fees.

Bank in urging that it was denied attorney's fees under an erroneous view of the law cites two Arizona cases as

adopting "by necessary implication" the rule "that where a stipulated per cent of a note is provided as attorneys' fees, such amount will be awarded in the absence of an issue as to and a showing of the unreasonableness thereof." Bank overlooks the most recent pronouncement of the Supreme Court of Arizona on the subject in *Elson Development Co. v. Arizona Savings and Loan Association*, 99 Ariz. 217, 407 P.2d 930, 934 (1965), as follows:

> "We hold that, in the instant case as to the three per cent stipulated in the agreement, it is not absolutely binding on the parties, or on the court, and the stipulation of three to four per cent as reasonable attorney's fees is binding only in the amount that the court finds to be reasonable from evidence."

From the foregoing, it is clear that the rule in Arizona is that stipulated attorney's fees are binding only in such amount as the court finds to be reasonable from evidence, thus affording a clear and correct legal basis for the District Court's finding herein that ten (10%) per cent of the amount due from Construction to Bank would be an unreasonable sum and its failure, in the absence of evidence as to what would be a reasonable attorney's fee, to award any amount for such fee.

Moreover, not every action affording recovery on a promissory note is one for collection within the provisions for attorney's fees. *Strickland v. Williams*, 215 Ga. 175, 109 S.E.2d 761, 763 (1959). Trustee by his Complaint attacked the assignment by Construction to Bank of the Wilmot Improvement Contract proceeds, seeking to set aside the transfer of $160,932.33 already received by Bank and to prevent the impending delivery of municipal bonds yet to be issued. Bank thus was called upon to defend the validity of the assignment under Count II of Trustee's Complaint as

to the funds previously received and under Count III as to the bonds yet to be issued and delivered. It would be ridiculous to suggest that the promissory note was "placed in the hands of an attorney for collection" of the $160,932.33 which Bank already had received, yet Bank's role in defense of its rights was identical as to both the funds previously received and the bonds subsequently issued and ultimately delivered pursuant to the assignment.

Finding of Fact No. 25 that ten (10%) per cent of the amount due from Construction to Bank would be an unreasonable attorney's fee is not clearly erroneous, and the provision in the promissory note for attorney's fees has no application to this case. For either reason, the failure of the District Court to award any amount as attorney's fees to Bank should be upheld.

Respectfully submitted

CHANDLER, TULLAR, UDALL & RICHMOND

By JAMES L. RICHMOND

Attorneys for Appellees Pacific National Insurance Company and Martin Construction Company

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES L. RICHMOND